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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 490

IN THE MATTER
of
SIDNEY SARNER,
Charged With Criminal Contempt,
Appellant.

ON APPEAL FROM FINAL JUDGMENT OF
THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS APPEAL

DAVID D. FURMAN,
Attorney General of New Jersey,
Attorney for and of Counsel with Appellee,
State House Annex,
Trenton, New Jersey.

MORTON I. GREENBERG,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

Statement of Questions Involved

1. May this Court note probable jurisdiction on an appeal from a State Supreme Court when the record shows that the decision was based on adequate non-federal grounds and there was no substantial federal question before the state courts?

2. May this Court note probable jurisdiction on an appeal from a State Supreme Court when the issues are moot?

Pursuant to Rule 16(1) of the Revised Rules of this Court, David D. Furman, Attorney General of New Jersey, moves that this appeal be dismissed on the grounds that there is a want of a substantial federal question properly advanced or expressly passed upon in the State courts and that the judgment rests on an adequate non-federal basis.

Statement of the Case

This is the second appeal from the Supreme Court of New Jersey in this case, the first appeal having been dismissed on motion of the Attorney General. 359 U. S. 533 (1959). A petition for rehearing was also denied. 360 U. S. 940 (1959).

Since the facts have been presented to the Court on the previous appeal they will only be summarized here. On November 7, 1957, during the course of a matrimonial action involving the appellant and his wife in the Superior Court of New Jersey, Chancery Division, Judge WILLIAM A. HEGARTY indicated that judgment for separate maintenance would be entered for his wife. On December 3, 1957, a hearing was held before Judge HEGARTY to ascertain if the appellant were able to pay alimony and counsel fees. At the hearing the appellant, evidently upset at the determination awarding separate maintenance, issued a verbal attack at Judge HEGARTY. (Appendix of the Appellant in the Appellate Division, 7a-10 to 8a-25 (hereinafter cited as "Apx").) Sarner then refused to respond to certain questions (Apx 8a-35 to 42). As a result of this conduct his wife's attorney moved that he be cited for contempt (Apx 7a-18 to 38). On March 6, 1958, Judge HEGARTY certified to the Assignment Judge of Bergen County that the appellant had committed a contempt before him (Apx 2a to 4a). This action was in obedience to the rules of that court, "The Revision of the Rules Governing the Courts of the State of New Jersey" (hereinafter cited as R.R.) which disqualify a trial judge from presiding at hearings on charges of contempt arising from disrepect or criticism of himself. R.R. 4:87-2(d). On March 10, 1958, Superior Court Judge J. WALLACE LEYDEN issued an order for the appellant to show cause on March 27, 1958, why he should not be adjudged guilty of contempt (Apx 1a). On March

27, 1958, the matter was heard by Superior Court Judge DAVID A. NIMMO (Apx 11a to 24a). A transcript of the hearing at which the contempt had been committed was made part of the record before Judge NIMMO. The appellant in open court conceded its accuracy (Apx 18a-12 to 19a-21), and though offering no evidence against the charge of contempt, demanded a jury trial (Apx 20a-29). While Judge NIMMO had discretion to honor this request he denied it because in view of the admission concerning the accuracy of the transcript he had no questions of fact to resolve (R.R. 4:87-3; Apx 20a-30 to 40). Judge NIMMO thereupon found the appellant guilty and sentenced him to 60 days in the Hudson County Jail (Apx 25a).

An appeal was taken to the Appellate Division of the Superior Court which entered judgment on September 17, 1958, affirming the action of the Chancery Division. Thereafter the matter was appealed to the Supreme Court of New Jersey but that Court affirmed the judgment of the Appellate Division. 28 N. J. 519, 147 A. 2d 244 (1959).

A further appeal was then prosecuted to this Court but a motion to dismiss it was made by the Attorney General. The brief in support of the motion of the Attorney General contained the following statement:

> "Though both appeals were tried on the record had the appellant desired to introduce new evidence he could have sought leave to do so since the New Jersey Constitution gives the Appellate Division and the Supreme Court such original jurisdiction as is necessary to dispose of any case before it. *New Jersey Constitution of 1947*, Art. VI, § 5, par. 3; *State* v. *Ferrell*, 29 N. J Super. 183, 102 A. 2d 70 (App. Div. 1954); see *Coleman* v. *Newark Morning Ledger Co.*, 29 N. J. 357, 149 A. 2d 193 (1959)."

Subsequently the appellant filed a reply brief in this Court opposing the motion. On page 15 of the reply brief the appellant declared:

> "The Attorney General's suggestion (Mot. p. 9) that appellant could have introduced new evidence in the state appellate courts ignores *Zimmerman* v. *Zimmerman*, 12 N. J. Super. 61, 69 (App. Div. 1950), cited in our Jurisdictional Statement, p. 23. Even more conclusive against the Attorney General's suggestion is *State* v. *Zarafu*, 35 N. J. Super. 177, 183-184 (App. Div. 1955). In any event, '* * * even at its rare best appellate review cannot begin to take the place of trial in the first instance by an impartial jury subject to review on the spot by an uncommitted trial judge.' *Green* v. *United States*, 356 U. S. 165, 200 (dissenting op.)."

This Court thereupon granted the motion and dismissed the appeal, 359 U. S. 533 (1959), and subsequently denied a rehearing. 360 U. S. 940 (1959).

The appellant then applied to the Superior Court of New Jersey, Appellate Division, for leave to file a petition for rehearing, asserting the Attorney General's alleged misrepresentation. On July 31, 1959, the application was denied, the Appellate Division refusing to entertain the petition, it being out of time. This motion was renewed on August 20, 1959, but on September 3, 1959, the Appellate Division once more refused to relax the rules and entertain the petition. See Appendix to Jurisdictional Statement 3a to 4a (hereinafter cited as "Appendix"). The appellant then petitioned the Supreme Court of New Jersey for certification to review the action of the Appellate Division but on September 29, 1959, the petition was denied (Appendix 5a). From that denial this appeal is prosecuted.

The appellant makes no argument not advanced on his first appeal. Principally he wrongfully contends that the Attorney General in the prior appeal indicated that he had a right to introduce new evidence before the Appellate Division and that the New Jersey courts have denied him that right. But the Attorney General made no such representation. Rather he only indicated that the appellant could have "sought leave" to introduce new evidence in the Appellate Division. Further he advanced these contentions on his previous appeal in his brief in opposition to the Attorney General's motion. The appellant has now served his sentence for contempt, being released on November 16, 1959.

ARGUMENT

The decision of the Supreme Court of New Jersey rests on three adequate non-federal grounds; thus this Court has no jurisdiction on this appeal. *National Ass'n for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449 (1958); *Woods* v. *Nierstheimer*, 328 U. S. 211 (1946). Firstly, the application seeking leave to file a petition for rehearing was out of time under the New Jersey rules. The petition in the Appellate Division was filed on July 14, 1959. The rules of that Court require that petitions for rehearing be made within 10 days from the date of its final judgment. R.R. 1:9-4; R.R. 2:9-2. Its final judgment had been entered on September 17, 1958 and the petition was denied on this ground.

Second, as the appellant points out in his jurisdictional statement, the application seeking a rehearing from the Appellate Division was made in order that he might present new evidence. But he had had ample opportunity to seek leave to present evidence to the Appellate Division on his first appeal. Hence he failed to assert this alleged right in a timely manner. Thirdly, the appellant, even if he had

timely presented a federal constitutional issue to the Appellate Division, by petitioning the Supreme Court of New Jersey for certification from the Appellate Division has foreclosed this Court from considering this appeal on the merits. Certification is discretionary with the Supreme Court of New Jersey in the same way that certiorari is discretionary with this Court. R.R. 1:10-2. But Article VI, Sec. V, paragraph 1 of the New Jersey Constitution of 1947 provides that appeals of right may be taken to the Supreme Court "In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State." See also R.R. 1:2-1. Though the appellant claims to present this Court with a federal constitutional question, by petitioning the Supreme Court of New Jersey for certification he invited that Court to refuse to pass upon the question notwithstanding the fact that on his own theory he could have required the Supreme Court of New Jersey to hear it. The invitation having been accepted, it is clear that the appellant has failed to exhaust his State remedies and has not preserved the rights now advanced (Appendix 5a). See 28 U. S. C. §1257(2), quoted below.

Further, there is no substantial federal question raised by this appeal. Jurisdiction is sought to be found under 28 U. S. C. §1257(2) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Yet, a reading of the jurisdictional statement makes plain that the appellant is really appealing from the Attorney General's allegedly false representations to this Court on the prior appeal. See Jurisdictional Statement, pp. 9-10. But he made the same point to this Court on the prior appeal but yet this Court refused to note jurisdiction. And both New Jersey courts have deemed the argument without enough merit to cause them to rehear this case. Further there was no misrepresentation. In his jurisdictional statement (p. 10) the appellant declares:

> "(a) In the aforesaid prior appeal in this Court the Attorney General of the State of New Jersey represented to this Court in his motion to dismiss said appeal that under the law of New Jersey the appellant was entitled to introduce new evidence in the Supreme Court of New Jersey and in the Superior Court, Appellate Division, in the proceedings for review of his conviction for contempt."

But nothing in the Attorney General's brief on the prior appeal indicated that the appellant had a "right" or was "entitled" to introduce new evidence. Rather the brief declared that the appellant "could have sought leave to" introduce new evidence. In short this appeal presents no issues not already adversely determined to the appellant on his first appeal to this Court. Manifestly it amounts to nothing more than another petition for rehearing.

Finally, inasmuch as the appellant has completed serving his sentence the appeal is moot and must be dismissed. *St. Pierre* v. *United States*, 319 U. S. 41 (1943) is controlling on this point. There a writ of certiorari allowed to review a criminal contempt conviction was dismissed because the sentence had been served. The court said:

"We are of opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate. A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the term of imprisonment which he has served." 319 U. S. at 42-43 (omitting citations).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

David D. Furman,
Attorney General of New Jersey,
Attorney for and of Counsel with Appellee.

Morton I. Greenberg,
Deputy Attorney General,
On the Brief.